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Trying to Level the Playing Field: Management's Entitlement to Economic Damages Resulting from Illegal Labor Strikes

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TRYING TO LEVEL THE PLAYING FIELD: MANAGEMENT'S ENTITLEMENT TO ECONOMIC DAMAGES RESULTING FROM ILLEGAL LABOR STRIKES

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I. INTRODUCTION

MOST REASONABLE people would agree that the days of Jimmy Hoffa style negotiating tactics are, by and large,

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dead and buried alongside Mr. Hoffa himself (wherever that may be). Specifically, in today's "more civilized" environment, it would be considered uncommon for a labor union to break the legs of a management leader in order to secure better benefits on behalf of its union members. But don't be too quick to jump to the conclusion that labor unions have lost power. On the contrary, the Wall Street Journal has provided a recent illustration of just how powerful labor unions have become over major rail and air carriers governed under the Railway Labor Act (RLA). With the technological communication advances our society has achieved over the past few years, labor unions can organize a strike at the drop of a hat, as opposed to the late 1800s and early 1900s (which were the formative years for the RLA) when the primary form of communication was the telegraph. Imagine what the financial repercussions could be to a major carrier, such as United Airlines or American Airlines, should a flight attendants' union call a strike for just one hour. The result would be extremely costly to carriers due to canceled flights and scrambled schedules. To illustrate, the Wall Street Journal reported within the last year that the Association of Flight Attendants (AFA) union has developed and utilized just such a new and potent negotiating tactic to wield over carriers.[1] The AFA has dubbed this new tactic "CHAOS," which stands for "Create Havoc Around Our System." It "involves a strike without warning—one flight at a time—instead of a mass walkout."[2] The AFA first used this tactic against Alaska Airlines in 1993.[3] The AFA ordered three flight attendants, who were working a fully booked Friday evening flight from Seattle to San Diego, to strike for a 40-minute period in order to delay that particular flight and to throw the proverbial monkey wrench into Alaska Airlines' flight schedule.[4] Over the next six months, six more flights were struck in similar fashion until Alaska Airlines' management finally acquiesced over the terms the labor union was demanding.[5] The success of the AFA's CHAOS program caused such anxiety in the airline industry that United Airlines would not even comment on the topic in Ms. Carey's Wall Street Journal article. The AFA obviously recognizes the power such a

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[1] *See* Susan Carey, *Airlines: United Flight Attendants Warn of "Chaos,"* WALL ST. J., June 24, 1997, at B1.

[2] *Id.*

[3] *See id.*

[4] *See id.*

[5] *See id.*

strike system has over its adversary—management, as indicated by some AFA leaders' statements. David Borer, general counsel for the AFA, stated that "it doesn't take a lot of strikes [of individual flights] to screw up an airline."[6] Patricia Friend, AFA's international president and former United Airline flight attendant, also discussed the potential power CHAOS can bring to a negotiating table. She stated, "By striking selectively, 'we take control of the schedule . . . .That's something management can't tolerate.' Without a reliable schedule to count on, . . . passengers would defect to other carriers."[7] A recent example of just such an occurrence was the "sick-out"[8] strike employed by the Allied Pilots Association (APA) against American Airlines in February 1999.[9] The APA's pilots engaged in a sick-out strike beginning February 5, 1999, until February 16, 1999, resulting in estimated losses to American Airlines in the range of $200-225 million.[10] American Airlines estimated that in a forty-eight hour period alone, from the evening of February 10 to the evening of February 12, it lost as much as $50.96 million.[11] Southwest Airlines has also reported that a mere one hour shut-down of its operations could result in the potential loss of millions of dollars when you factor in both actual losses and lost goodwill.[12] Therefore, the potential disruptive effect of a CHAOS scheme or a sick-out strike plan is highly severe.

Now, what would you think if the AFA's CHAOS system, or the APA's sick-out strategy were employed illegally, i.e., striking over a minor issue in violation of federal statute? Research has revealed no situations where the AFA has engaged in a CHAOS strike over a minor issue under the RLA, but the APA's recent sick-out against American Airlines was illegal and in violation of federal statute.[13] Logically, one would believe the carriers

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[6] *Id.*

[7] Carey, *supra* note 1.

[8] A sick-out strike is where employees, pilots in this case, do not report for work in an organized manner claiming to be sick when they actually are not.

[9] *See* Terry Maxon, *Pilots Must Pay $45.5 Million*, DALLAS MORNING NEWS, April 16, 1999, at A1.

[10] *See id.* at A20.

[11] *See id.*

[12] This rough estimate was obtained courtesy of Southwest Airlines attorney, Mr. Jim Parker.

[13] *See* American Airlines, Inc. v. Allied Pilots Ass'n, No. 7:99-CV-025X, 1999 WL 66188, at *1 (N.D. Tex. Feb. 13, 1999) (order of contempt); *see also* Consolidated Rail Corp. v. United Transp. Union Gen. Comm. of Adjustment, 947 F. Supp. 168 (E.D. Pa. 1995) (involving a strike similar to CHAOS in that the labor utilized

should be entitled to recover for damages sustained as a direct result from the illegal strikes. With only one exception, however, courts have denied carriers the ability to recover damages against unions for illegal strikes that violate the statutory provisions of the RLA.[14] This is so notwithstanding the fact that the RLA does not contain a statutory provision proscribing carriers from seeking consequential damages from unions for illegal strikes.[15] Therefore, the economic stakes are quite high in challenging the status quo position taken by the judicial system that carriers cannot recover monetary damages directly sustained as a result of illegal union strikes.

This article will explore the reasons why employers under the RLA have run into a brick wall in the court system when seeking monetary damages against labor unions for illegal strikes. Additionally, an attempt will be made to justify why carriers need to have the ammunition of economic sanctions against labor unions for illegal strikes in order to maintain the balance of power that was intended under the RLA. In a nutshell, the primary argument against allowing carriers the right to seek monetary damages against labor unions for illegal (minor) strikes is that it would strip away the labor unions primary source of leverage—economic force, or a strike. Courts fear that forcing labor unions to comply with the RLA by not striking over minor issues would have a chilling effect on the ability of labor unions to negotiate. Furthermore, the courts seem unjustifiably content to rely upon the fact that for sixty-nine years since the RLA was enacted in 1926, no court has ever awarded damages to a carrier against a union for illegally striking over a minor issue.

The primary arguments for allowing carriers to recover the economic damages sustained directly from illegal strikes are that there are no explicit statutory limits in the RLA for not allowing damage remedies, and that Congress initially intended for monetary damages to be an available remedy. Moreover, damage remedies are seriously needed in today's business environment

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short-lived and precisely coordinated strikes to disrupt and frustrate management while negotiating a minor issue under the RLA).

[14] *See, e.g.*, Louisville & Nashville R.R. Co. v. Brown, 252 F.2d 149, 155 (5th Cir. 1958) (providing that carrier was denied damage awards); Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employees, 961 F.2d 86, 88 (5th Cir. 1992). This list could continue much further. The lone exception of a court awarding damages to a carrier against a union for illegally striking over a minor issue is the more recent case of *Consolidated Rail Corp.*

[15] *See* 45 U.S.C. §§ 151-188 (1994).

to restore the balance of power that was intended under the RLA. These issues will be thoroughly examined throughout this article;[16] it is essential, however, to first understand the history behind the enactment of the RLA in 1926, the primary goals the RLA seeks to accomplish, and of course, the basic provisions of the RLA. Some of the most important provisions of the RLA relating to this article are as follows: how the RLA classifies a dispute as being either "major" or "minor," what machinery the RLA provides for the peaceful resolution of major and minor disputes, and what constitutes a lawful or unlawful strike.

II. HISTORY OF THE RLA

The RLA was enacted in 1926 with the primary purpose of "[avoiding] any interruption to commerce or to the operation of any carrier engaged therein . . . ."[17] The enactment of the RLA in 1926 came after many years of labor strife in the railroad industry and many failed legislative attempts to achieve harmony between rail carriers and rail labor. In the late 1880s, the railroads performed a critical commercial and transportation function in this country, and it was imperative that uninterrupted rail service be provided for the country to operate efficiently. The most common, and most feared, interruption to the railroad consisted of labor strikes by one or more railroad unions. After the Great Railroad Strike of 1877, in which federal troops became involved, several states and Congress seriously began to

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[16] As stated above, this article will focus on why carriers should be afforded the opportunity to seek monetary damages against unions for striking illegally over minor issues as provided by the RLA. This article will not focus on the availability for carriers to seek monetary remedies resulting from illegal strikes that break the status quo requirement when negotiating major disputes.

[17] 45 U.S.C. § 151(a). The other stated purposes of the RLA are as follows:

> (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Id. Purposes (4) and (5) involve major and minor issues respectively. These will be discussed in further detail later in this article, as it will be important to understand the distinction of classifying disputes as being either major or minor.

consider legislation to provide a mechanism for the prompt and peaceful resolution of rail labor strikes.[18] One of the primary stumbling blocks Congress faced in enacting some type of legislation to address the growing labor problem in the rail industry was constitutional in nature.[19] This constitutional dilemma was simply that "[f]orcing people to work against their will would be involuntary servitude."[20] Congress responded to the public's demand for some type of mechanism to prevent incidents such as the Great Railroad Strike of 1877 by enacting the Arbitration Act of 1888.[21] The Arbitration Act of 1888 was merely the first of several failed attempts to provide a system for the rail industry to resolve labor disputes peacefully and promptly.[22] Each of the unsuccessful legislative efforts had a common fundamental flaw. That fundamental flaw was the lack of a mandatory procedure for resolving disputes and the absence of an enforcement mechanism for maintaining a balance of power between the carriers and the unions. This is important to remember throughout the following discussion of the pre-RLA acts as it plays a vital and persuasive role in the argument for allowing carriers to pursue monetary damages against unions for illegal strikes under the RLA.

A. PRE-RLA LEGISLATIVE ENACTMENTS

The Arbitration Act of 1888 was intended to provide the necessary machinery that would lead to peace in the labor industry by authorizing the arbitration of rail labor disputes that threatened to "hinder, impede, obstruct, interrupt, or affect" interstate rail transportation.[23] The Act called for the unions and carriers—*only if they jointly agreed to arbitration*—to each select an arbitrator, who would each presumably be partisan in his ideology.[24] Once the two partisan arbitrators had been selected by their respective sides, the two arbitrators would then select a

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[18] *See* FRANK N. WILNER, THE RAILWAY LABOR ACT AND THE DILEMMA OF LABOR RELATIONS 29 (1991).

[19] *See id.*

[20] *Id.*

[21] *See* RAILWAY AND AIRLINE LABOR LAW COMM., AMERICAN BAR ASS'N, THE RAILWAY LABOR ACT 12-13 (Douglas L. Leslie et al. eds., 1995).

[22] *See id.* at 12-55.

[23] Arbitration Act of 1888, ch. 1063, 25 Stat. 501 (1888).

[24] *See* WILNER, *supra* note 18, at 31; Arbitration Act of 1888, ch. 1063, 25 Stat. 501-02.

third neutral board member as the swing vote.[25] In addition, when the threat to transportation and commerce was deemed serious, the "President could unilaterally appoint an investigatory board of two members who, together with the commissioner of labor, would investigate the causes and recommend means of settlement."[26] There were two main problems with the Arbitration Act of 1888 that should be kept in mind when considering the thesis of this article and the present-day RLA. First, the only mechanism available to enforce awards of either arbitration or investigatory boards was public opinion.[27] Also, the dispute resolution mechanisms of the Arbitration Act of 1888 were *merely voluntary* on behalf of either the unions or the carriers.[28] While the Arbitration Act of 1888 remained valid law for a ten-year period, the voluntary arbitration process was never employed, and the Presidential investigatory board was appointed only once after the Pullman strike was defeated through the utilization of federal troops to enforce a federal injunction.[29] In the investigatory report issued after the Pullman strike, the Presidential commission recommended a "more permanent framework for arbitration" and a need to rethink the Arbitration Act of 1888.[30] Congress then began the debate to retool the Arbitration Act of 1888 in 1895 with the above recommendations in mind.[31]

In response to the failings of the Arbitration Act of 1888, Congress enacted the Erdman Act.[32] This Act had the same flaw as the Arbitration Act of 1888 in that it could be invoked only at the request of carriers or rail unions.[33] The modification in the Erdman Act was that it called first for mediation, "with mediators directed to encourage – when mediation failed – voluntary arbitration by a three-member board (one representative

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[25] *See* WILNER, *supra* note 18, at 31; Arbitration Act of 1888, ch. 1063, 25 Stat. 501-02.

[26] WILNER, *supra* note 18, at 31; *see* Arbitration Act of 1888, ch. 1063, 25 Stat. 501.

[27] *See* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 13.

[28] *See id.*

[29] *See id.* at 14.

[30] *Id.* (quoting SHELTON STROMQUIST, A GENERATION OF BOOMERS: THE PATTERN OF RAILROAD LABOR CONFLICT IN NINETEENTH-CENTURY AMERICA 19, 23 (1987)).

[31] *See id.*

[32] *See id.*

[33] *See* WILNER, *supra* note 18, at 32.

each for labor and management, plus one neutral)."[34] The arbitration award, interestingly, was to be binding on the parties and to "continue in force as between the parties thereto for the period of one year after the same shall go into practical operation."[35] The call for mediation first was "founded on the belief that if employers 'take labor into consultation at proper times, much of the severity of strikes can be tempered and their number reduced.'"[36] Another distinguishing feature of the Erdman Act was that "[b]oth sides were required to maintain the *status quo* during arbitration, and awards could be enforced by a court of equity—but no injunction could be issued compelling individuals to work against their will," which made the injunction provision of the Erdman Act somewhat illusory.[37] This is so because it could not compel a labor union to terminate a strike and return to its duties. The availability of an injunction to enforce the arbitration award, despite its apparent hollow nature, illustrates that Congress began to at least recognize the need to enforce the provisions of its legislation, which in this case was the Erdman Act.

All in all, the Erdman Act was relatively successful. In the twenty-five years of its existence, there was only one major strike in the railroad industry, and even that one involved a shop craft union that was not under the jurisdiction of the Erdman Act.[38] Noteworthy is the fact that the Erdman Act formed the foundation of future labor law in the United States and was the basis of "new labor-negotiating strategies."[39] Unfortunately, the parties began to express dissatisfaction with the Erdman Act.[40] The unions became skeptical of government intervention and believed that such government intervention deprived them of their main source of leverage – economic force.[41] The carriers also began

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[34] *Id.*

[35] Erdman Act, Ch. 370, § 3, 30 Stat. 424, 426 (1898).

[36] WILNER, *supra* note 18, at 31 (quoting *U.S. Strike Comm'n, Report of the Chicago Strike of June-July 1894*, p. LIV.).

[37] *Id.* at 32; *see* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 16.

[38] *See* WILNER, *supra* note 18, at 33.

[39] *Id.* at 33. Wilner states that the unions would often strike to force mediation, seeking to "whipsaw carriers into accepting favorable agreements." *Id.* Also, on occasion, unions "coordinated their bargaining efforts—the embryo of national handling." *Id.* Therefore, the Erdman Act era gave birth, so to speak, to the concept of present-day labor negotiating tactics employed by unions.

[40] *See id.*

[41] *See* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 18; *see also* HARRY D. WOLFF, THE RAILROAD LABOR BOARD 8 (1927). The fact that labor be-

to realize that the arbitrators lacked specialized knowledge of the rail industry that crippled their ability to reach amicable solutions.[42] And the ever-present flaw of mere voluntary arbitration acted as an inhibitor to prompt and peaceful resolution of labor disputes. Why would a party, either the carriers or the unions, want to risk an unfavorable binding arbitration award if the obligation to arbitrate were merely voluntary? The unrest by both parties resulted in a potential strike in 1913, which led to President Wilson's intervention.[43] Shortly thereafter, Congress amended the Erdman Act.[44] Again, the lack of reciprocally-mandated resolution mechanisms doomed Congress' latest legislative effort to eventual failure.

The Newlands Act resulted from Congress' refinement of the Erdman Act.[45] The Newlands Act refined the Erdman Act's mediation provisions and improved its arbitration features to address the unrest that had developed among both the labor unions and management.[46] There were two main changes in the mediation features which consisted of creating a permanent mediation board (composed again of three members, including one neutral),[47] and allowing the mediation board to "'proffer its services'" rather than wait to be engaged by either party. Under the Newlands Act, if the mediation board deemed a dispute serious enough to threaten the public, it could offer its services unilaterally in an effort to resolve the dispute while still in its infancy.[48] The Newlands Act also established a permanent arbitration board composed of six members (two arbitrators from each side and two neutrals).[49] Again, however, arbitration under this act was voluntary, with awards being binding if arbitration was the selected means of dispute resolution.[50] The Newlands Act did not require that both sides maintain the status quo during the period a dispute was arbitrated.[51] But, it allowed the courts to invoke injunctive relief to enforce arbitration

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came skeptical of government intervention is ironic considering labor's modern day pro-government ideology.

42 *See* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 18.

43 *See id.* at 18-19.

44 *See id.* at 19.

45 *See id.*; *see also* ch. 6, 38 stat. 103 (1913).

46 *See* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 19.

47 *See id.*

48 *See id.*

49 *See id.* at 20.

50 *See id.*

51 *See id.*

awards, which again showed Congress's recognition of the need to provide some sort of enforcement mechanism. Yet, like the Erdman Act, the court's injunctive power continued to be limited because an injunction could not "'require an employee to render personal service without his consent, and no injunction (could) be used which [compelled] the performance by any employee against his will of a contract for personal labor or service.'"[52]

The absence of a compulsory resolution mechanism eventually doomed the effectiveness of the Newlands Act as well. In 1916, the labor unions demanded an eight-hour workday standard instead of a ten-hour standard, and time-and-a-half pay for any hours worked over the standard of eight.[53] Rail labor united nationally to form a bargaining unit over the issue.[54] The rail carriers feared a substantial increase in costs if they yielded to the labor demands, and therefore, did not acquiesce.[55] Because arbitration was voluntary, both sides declined to arbitrate the hourly standard dispute, fearing an unfavorable binding award.[56] At the same time this dispute between the unions and the carriers was taking place, the United States faced the prospect of entering World War I, and it was in the nation's interest to avoid severe interruptions of transportation and commerce. Faced with the possibility of a debilitating railroad labor strike, President Wilson addressed Congress on August 29, 1916, to express his regret for the lack of legislation mandating compulsory resolution mechanisms to resolve potentially severe labor disputes in the rail industry.[57] President Wilson worked to convince Congress to pass legislation granting the eight-hour workday to the labor unions to avoid a strike, thus preventing a national crisis.[58] Congress reacted to the President's request and passed the Adamson Act a week after his address.[59]

Following the passage of the Adamson Act and the declaration of war against Germany on April 6, 1917, President Wilson seized the railroads under the authority of the Army Appropria-

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[52] *Id.* (quoting ch. 6, § 8, 38 Stat. at 107).

[53] *See* WILNER, *supra* note 18, at 35.

[54] *See id.*

[55] *See id.*

[56] *See id.*

[57] *See* WILNER, *supra* note 18, at 36.

[58] *See id.* (citing *Report of the U.S. Eight-Hour Commission* 77 (U.S. Government Printing Office 1918)).

[59] *See* WILNER, *supra* note 18, at 36; *see also* Adamson Act, ch. 436, 39 Stat. 721 (1916).

tion Act of 1916.[60] President Wilson justified this seizure by "citing labor difficulties, congestion, and ineffective operation" in the rail industry.[61] President Wilson retained federal control over railroads until March 1, 1920.[62] During the period of federal control, a Railroad Wage Commission was created that "entered into national agreements with rail labor."[63] Additionally, boards of adjustment were established to address all grievances (except those relating to compensation) concerning interpretations of or changes in existing agreements.[64] These boards had equal representation by both management and labor.[65]

While the rail industry was under federal control, major employers and unions pledged to the President a no-lockout, no-strike oath for the duration of the war.[66] A National War Labor Board, empowered with the ability to summon parties to hearings, was established as a mediation panel.[67] The President urged management and labor in all industries to maintain a high level of production of war necessities while mediations and arbitration were conducted, thereby discouraging any opportunistic actions by either side.[68] While the federal government controlled the rail industry, railroads were guaranteed "a return as great as the average profit they had received between June 1914 and June 1917" under the fair and just compensation provisions of the seizure authority.[69] Not only did federal control guarantee profit levels for the rail carriers, it also maintained salary levels for the railroad employees and actively encouraged railroad employees to become union members.[70] This satisfied the unions, and as one should expect, irritated rail management. Management became eager to escape the federal government's regulations and return to a market based industry.[71]

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60 *See* WILNER, *supra* note 18, at 38. Via the Army Appropriation Act of 1916, the President has the authority, "without any expiration date, the power to take possession of and utilize, in time of war, any part or system of transportation—compensation to be 'fair and just.'" *Id.* at 38 n. 170; *see also* ch. 418, 39 Stat. 619 (1916).

61 WILNER, *supra* note 18, at 38.

62 *See id.*

63 *Id.*

64 *See id.*

65 *See id.*

66 *See id.*

67 *See* WILNER, *supra* note 18, at 38.

68 *See id.* at 38-39.

69 *Id.* at 39-40.

70 *See id.* at 40.

71 *See id.*; *see also* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 32.

Accordingly, following the end of World War I, the rail labor unions made an unsuccessful effort to nationalize the rail industry, which failed in large part due to the political influence of rail management.[72] As a result of the apparent pro-labor position the federal government had established while it controlled the rail industry, management began to voice numerous complaints that the machinery the Railroad Administration set up for the adjustment of disputes undermined the authority of the railroad executives.[73] Railroad executives began to accuse the government of acquiescing too easily to labor in order to maintain and assure labor peace at the expense of management.[74] All of these events signaled an abrupt change in policy. Prior to entering the twentieth century, organized labor had viewed the federal government as its adversary.[75] Frank N. Wilner described it well when he characterized the transition that occurred during federal control of the rail industry by stating "[the government had] embarked upon a promotional course that was to lead to legislation that would encourage union membership and provide flesh and sinew to the skeleton of collective bargaining rights."[76] After some consideration, the President finally announced that the railroads would be returned to private operation effective March 1, 1920.[77]

The final legislative enactment worth discussing, prior to the enactment of the RLA in 1926, is the Transportation Act of 1920. In the bill-making process of the Transportation Act, the House and Senate each had two different ideas about what was necessary to effectuate labor harmony. The Senate version of the Transportation Act took a strict approach for dispute resolution mechanisms by providing for compulsory resolution of disputes through various adjustment boards.[78] The Senate version also contained a provision making it a criminal offense to strike.[79] The House rejected the notion of compulsory arbitration and instead adopted a plan calling for the resolution of dis-

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[72] *See* WILNER, *supra* note 18, at 40.

[73] *See* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 33.

[74] *See id.*

[75] *See* WILNER, *supra* note 18, at 40.

[76] *Id.*

[77] *See* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 20, at 33 (citing 58 Cong. Rec. 40-42 (1919)).

[78] *See id.* at 36 (citing WOLFF, *supra* note 41, at 83-86).

[79] *See id.* According to Wolff, there was heated debate over the issue of compulsory arbitration until the occurrence of the bitter strike known as "The Steel Strike of 1919." *See id.* at 36 n.183. After this incident, the Senate had relatively

putes through direct negotiation.[80] If direct negotiation was unsuccessful, dispute resolution would be channeled through partisan adjustment boards and arbitration. But arbitration was again voluntary and to be pursued only by mutual agreement. The House bill did have some teeth to it, however. It "provided that carriers or labor organizations could be sued for damages if they breached any contract reached by negotiations or arbitration."[81] The final product reached by the Conference Committee between the House and Senate had some similarities in what was eventually to become the RLA. The Transportation Act ordered labor and management "to exert every reasonable effort . . . to avoid any interruption" in the carrier's services arising out of a labor dispute.[82] The major weakness of this bill was that it did not provide for the enforcement of the above-mentioned duty through the courts or an administrative agency, a common theme throughout this discussion of pre-RLA legislative efforts.[83] Instead, the bill relied upon public pressure to compel compliance with the Transportation Act's directives to "exert every reasonable effort" to avoid interruption in rail services.[84]

The main provisions for dispute resolution called for direct conferences between representatives of the employer.[85] During these direct conferences, the parties were to address disputes concerning wages, "salaries, rules, and working conditions, as well as any grievances arising under labor agreements."[86] Futhermore, if the parties so agreed, they were permitted to establish adjustment boards "to consider any dispute 'involving only grievances, rules or working conditions, not decided' . . . (through negotiation)."[87]

If conferences failed to resolve a dispute, "the statute provided for referral of disputes 'with respect to the wages or sala-

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no problem in passing their form of the Transportation Act that included the compulsory arbitration provision. *See id.*

[80] *See id.* at 35 (citing H.R. 10453, H.R. Rep. No. 456, 66th Cong., 1st Sess. 15-16 (1919)).

[81] RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 35.

[82] Transportation Act of 1920, tit. III, § 301, 41 Stat. 456, 469, which provided in part: "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof." *Id.*

[83] *See id.*

[84] *Id.*

[85] *See id.*

[86] RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 36.

[87] *Id.* at 36-37 (citing Transportation Act of 1920, tit. III, § 303, 41 Stat. at 470).

ries of employees' to a newly created federal agency [called] the U.S. Railroad Labor Board (RLB)."[88] Moreover, the RLB was to consider any dispute that had been referred to an adjustment board under three circumstances. These three situations were when "(1) the Adjustment Board failed to reach a decision, (2) the Adjustment Board referred the dispute to the RLB, or (3) the RLB on its own motion removed a dispute from an Adjustment Board for decision."[89] And finally, "any dispute able referable to an Adjustment Board could be referred directly to the RLB if the appropriate Adjustment Board had not been established."[90] The RLB was authorized by statute "to hold hearings and issue decisions that would provide for 'just and reasonable' wages, salaries, and working conditions."[91]

But the Achilles heel of this statute—the lack of an enforcement mechanism to ensure compliance with the act's provisions—was exposed in the U.S. Supreme Court case of *Pennsylvania Railroad Co. v. United States Railroad Labor Board* in 1923.[92] In the majority opinion written by Chief Justice Taft, the Court analyzed the enforcement powers of the Transportation Act.

> It is evident from a review of title 3 of the Transportation Act of 1920 that Congress deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first by conference between the parties, failing that, by reference to adjustment boards of the parties' own choosing and, if this is ineffective, by a full hearing before a national board appointed by the President, upon which are an equal number of representatives of the Carrier Group, the Labor Group, and the Public. The decisions of the Labor Board *are not to be enforced by process.* The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the [Labor] Board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the public in the undisturbed

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[88] *Id.* at 37 (quoting Transportation Act of 1920, tit. III, § 307(b), 41 Stat. at 471).

[89] *Id.* (quoting Transportation Act of 1920, tit. III, §§ 303, 307(a), 41 Stat. at 469-71).

[90] *Id.* (quoting Transportation Act of 1920, tit. III, § 307(a), 41 Stat. at 471).

[91] *Id.* (quoting Transportation Act of 1920, tit. III, § 307, 41 Stat. at 471).

[92] 261 U.S. 72, 79 (1923).

> flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it.[93]

The lack of an enforcement mechanism under the Transportation Act was harmful to both sides, but it especially hurt the labor unions. If the employers disagreed with a decision reached by the Labor Board, they could simply ignore it and continue with their desired course. The labor unions, however, had few choices if a Labor Board decision was rendered against them. The two options were to abide by the disfavored decision, or quit or go on strike. The result was an imbalance of power between the carriers and unions under the Transportation Act of 1920. Representative Barkley summarized the ill feelings of rail labor in April 1924 toward the Transportation Act by stating:

> [U]p until November, 1923, there had been 148 violations of the decisions of the Railroad Labor Board by the carriers . . . . If an employee or group of employees is dissatisfied with the decision of the Railroad Labor Board all they can do is to quit work. They either must abide by the decision or subject themselves to discharge by their employer, or quit work. In other words, the carrier has the means of enforcing the law against the employee by compelling him either to quit or to go on strike, while the employee has no remedy either legal or economic against the carrier who disobeys the orders of the commission except to strike.[94]

The absence of an ability to enforce Labor Board decisions was not the only shortcoming in the Transportation Act of 1920, but it was significant due to the advantage it created for the carriers. This advantage, in turn, lead to the union boycott of RLB procedures, which eventually led to the demise of the Transportation Act and the enactment of the RLA in 1926.[95]

There is a cliché that states, "History has a tendency to repeat itself," and it was worthwhile to comment on the common shortcomings that each pre-RLA act failed to contain. The common inherent flaws were the absence of a mandatory resolution provision and the lack of an enforcement mechanism to ensure compliance. The absence of these necessary measures led to

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[93] *Id.* at 79-80 (emphasis added).

[94] 65 CONG.REC. 6380, 6385 (1924) (statement of Rep. Barkley).

[95] *See* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 43.

either a swing in the balance of power between the carriers and the unions,[96] or to a simple inability to resolve disputes.[97] As this article develops, it will become evident that rail and air carriers need the ability to seek and recover economic damages against labor unions for unlawful strikes to preserve the RLA's foundation and integrity. This argument will be made all the more compelling in light of the pre-RLA legislative history because without carriers' ability to seek compensatory damages, arguably the RLA will have lost its compulsory resolution procedures and enforcement mechanisms, thus rendering the RLA no better than its legislative ancestors.

III. THE RAILWAY LABOR ACT

A. THE RLA'S CREATION

The creation of the RLA was truly unique in that it was fashioned by management and union leaders rather than by Congress.[98] Recognizing the ineffectiveness of the numerous pre-RLA legislative acts, President Coolidge on December 6, 1923, called for both carrier and union leaders to work together to form an agreement providing for the prompt and peaceful resolution of rail labor disputes.[99] President Coolidge added, "[i]f a substantial agreement can be reached among the groups interested, there should be no hesitation in enacting such agreement into law."[100] A little more than a year later in 1925, rail management and labor leaders met to formulate a bill that would replace the Transportation Act of 1920.[101] After considerable compromise, the carriers and the unions presented their agreement to Congress for approval in 1926.[102] Donald R. Richberg, a chief attorney for the rail labor unions, mentioned in his statement to the House regarding the bill:

> I want to emphasize again that this bill *is the product of a negotiation between employers and employees* . . . . For the first time representatives of a great majority of all the employers and all the

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[96] *See id.* (discussing the impact the Transportation Act of 1920 had on the rail industry due to its lack of enforcement provisions).

[97] *See id.* at 12-43 (noting the consequences of having "mere" voluntary arbitration instead of compulsory arbitration in every pre-RLA legislative act).

[98] *See id.* at 44.

[99] *See* LEONARD A. LECHT, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION 31, 48 (1955).

[100] *See id.* at 48.

[101] *See* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 44.

[102] *See id.*

> employees in one industry conferred for several months for the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community . . . .[103]

Because the rail carriers were experiencing a period of high profitability, they were willing to trade some economic benefits for the security of having an extended period without strikes.[104] Also, the rail carriers knew that legislation improving the Transportation Act of 1920 would eventually pass with or without their input; therefore, the carriers would rather participate in enacting the bill to secure representation of management's interests.[105] Accordingly, the rail carriers greatly favored the RLA. The unions supported the bill chiefly because they intensely disliked the RLB under the previous Transportation Act.[106]

Unfortunately, the RLA as passed in 1926 had the same fatal flaw as all of the previous legislative efforts. In what a New York Times editorial stated as the RLA's "greatest virtue"—the bill sought to resolve disputes through mediation and voluntary arbitration rather than by compulsory mechanisms—turned out to be a great weakness in the newly drafted legislation and would require an amendment in 1934 to correct the deficiency.[107]

Despite the major flaw in the 1926 version of the RLA, it still set forth several important principles. First, the RLA laid out and established its main objectives. Its relevant purposes were:

> (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; . . . [and] (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of [already

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[103] *Id.* at 45 (citing *Railroad Labor Disputes: Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce*, 69th Cong. 198 (1926) (statement of D.R. Richberg). This will be worth recalling as this article progresses because an argument will be made that the RLA's formulation was quasi-contractual in nature. Therefore, a breach of the contract, e.g., illegally striking over a minor issue, would render a damage award appropriate since damages are generally accepted under contractual damage theories.

[104] *See* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21 at 45.

[105] *See id.*

[106] *See id.*

[107] *See id.* (quoting N.Y. TIMES, Mar. 17, 1926, at 24).

existing] agreements covering rates of pay, rules, or working conditions.[108]

Regarding dispute resolution procedures, the 1926 RLA required the parties to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions."[109] The RLA further provided fixed procedures relating to resolving collective bargaining disputes over changes in rates of pay, rules, and working conditions,[110] as well as disputes arising from grievances and the interpretation or application of agreements.[111] "The [1926 version of the RLA] stressed reliance on the voluntary resolution of disputes, and to assist in this purpose, it established separate procedures through which each type of dispute must pass."[112] These "types" of disputes consist of two forms characterized as either "major" or "minor." The dispute's characterization is significant because ultimately it will determine which path the dispute takes under the dispute resolution process that the RLA governs.

There has been much litigation over the years concerning what constitutes a major dispute versus a minor dispute. Interestingly, the major dispute/minor dispute terminology is not used in the language of the RLA.[113] The Supreme Court first made the major dispute/minor dispute distinction in *Elgin, Joliet & Eastern Railway Co. v. Burley*[114] by holding minor disputes to be controversies over the meaning or application of an existing collective bargaining agreement or employment condition in a particular situation. In other words, a minor dispute "contemplates the existence of a collective agreement already concluded

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[108] Ch. 347, § 2, 44 Stat. 577 (1926). The other goals not pertinent to this article's issue were "(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; [and] (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter." *Id.* The 1934 RLA amendment reenacted these provisions comprising this section without change. 45 U.S.C § 151(a) (1994).

[109] RLA, Pub. L. No. 69-257, § 2, First, 44 Stat. 577, 577-78 (1926).

[110] *See id.* § 5, First; §6, 44 Stat. at 580, 582. Disputes arising out of these issues are commonly referred to as being major. This will be discussed in further detail shortly.

[111] *See id.* § 3, First (c), 44 Stat. at 578. These types of disputes are characterized as minor and will also be discussed in further detail in the subsequent paragraphs.

[112] RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 46.

[113] *See* 45 U.S.C. §§ 151-188.

[114] 325 U.S. 711, 722-24 (1945) (analyzing 45 U.S.C.A. § 152, subd. 7 (1934)).

or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one."[115] Minor disputes differ from major disputes, which consist of a disagreement over "the formation of collective agreements or efforts to secure them."[116] Major disputes "arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy."[117] The Court distinguished the two disputes by adding that major disputes look to the acquisition of future rights while minor disputes look to the assertion of rights claimed to have vested in the past.[118]

The two forms of disputes under the 1926 RLA had differing dispute resolution mechanisms. For controversies over a proposed change to an existing agreement (major issues), the RLA provided for a process that relied upon collective bargaining to reach an accord.[119] The RLA first required the parties to provide at least thirty days written notice regarding any "intended change affecting rates of pay, rules, or working conditions."[120] The RLA then obligated the parties to exert every reasonable effort to resolve the dispute through direct negotiations on their own without government intervention.[121] If the conferences between the carriers and labor were unsuccessful, however, the government could then intervene to assist with settling of the dispute via mediation by the Board of Mediation.[122] If the Board of Mediation reached no resolution, the next step was voluntary arbitration, or if either party rejected voluntary arbitration, the dispute was to proceed through an Emergency Board investigation.[123] While the dispute was proceeding through the RLA's mechanisms, and for thirty days after the Emergency Board had issued its report, neither party was to change the "conditions out of which the dispute arose."[124]

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115 *Id.* at 723.

116 *Id.*

117 *Id.*

118 *See id.* at 722-24.

119 *See* RLA, Pub. L. No. 69-257, § 5, First; 44 Stat. 577, 580. This section provides guidance for resolving major issues.

120 RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 46 (quoting RLA, Pub. L. No. 69-257, § 6, 44 Stat. 577, 582 (1926)).

121 *See* RLA, Pub. L. No. 69-257, § 2, First, Second, 44 Stat. 577, 578.

122 *See* RLA, Pub. L. No. 69-257, § 5, 44 Stat. 577, 580-82.

123 *See id.* § 7, First, § 10, 44 Stat. 582, 586-87.

124 *Id.* § 10, 44 Stat. at 587.

For controversies arising out of "grievances or out of the interpretation or application of [already existing] agreements concerning rates of pay, rules, or working conditions [minor issues], the statute also relied upon conferences, but added an additional step."[125] Disputes of this character were initially to be addressed in the "usual manner up to and including the chief operating officer of the carrier designated to handle such disputes."[126] If the dispute remained unresolved, it was to be referred to a Board of Adjustment, which both parties were to compose by agreement.[127] "The Boards of Adjustment were to be comprised of an equal number of management and employee representatives. Additionally, all decisions would be final and conclusive on the parties provided the Adjustment Board reached a majority decision."[128] Should the Board of Adjustment deadlock, thereby rendering resolution of the dispute impossible, either party could refer the dispute to the Board of Mediation.[129] Once the dispute was referred to the Board of Mediation, the controversy would be subject to the same mediation and voluntary arbitration process as those disputes arising out of intended changes to already existing agreements (major issues).[130]

The Board of Mediation was "composed of five members nominated by the President and confirmed by the Senate."[131] The Board of Mediation's goal was to help the parties reach an agreement for both types of disputes (minor and major).[132] The Board itself, or either of the parties, "could invoke its procedures to mediate disputes over changes to agreements [major issues] or arising out of grievances or contract interpretation issues [minor issues] not resolved by the Adjustment Boards."[133] If the Board of Mediation was unsuccessful in resolving the dispute, it was required to "endeavor as its final required action . . . to induce the parties to submit their controversy to arbitration."[134] Arbitration, as pointed out earlier, was completely voluntary; the RLA's provisions stated "the failure or re-

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125 *See* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 47.
126 RLA, Pub. L. No. 69-257, § 3, First (c), 44 Stat. 577, 578.
127 *See id.* § 3, 44 Stat. at 578-79.
128 RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 47.
129 *See id.* at 47.
130 *See id.* at 48.
131 *Id.*
132 *See id.*
133 *Id.*
134 RLA, Pub. L. No. 69-257, § 5, 44 Stat. 577, 580.

fusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise."[135]

Arbitration panels were composed of "three or six members, with each party choosing either one or two partisan members."[136] The selected partisan members then selected the remaining neutral members necessary (either the third, or the fifth and sixth members).[137] Arbitration Board awards were final and binding on the parties.[138]

If dispute resolution remained unsuccessful, and the controversy "in the judgment of the Board of Mediation, threaten[ed] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service,"[139] the Board of Mediation was obligated to notify the President of the United States of the potential crisis.[140] The President, if he deemed it necessary, could then assemble an Emergency Board.[141]

The Emergency Board's duty would be to investigate the situation and complete a report within thirty days from the date the President assembled the Emergency Board.[142] Once the Emergency Board completed its report, the Board was to make the report available for public consideration.[143] The RLA further provided that once the Emergency Board was created and for thirty days after it issued its report, "no change, except by agreement, [could] be made by the parties to the controversy in the conditions out of which the dispute arose."[144] The Emergency Board's conclusions contained within its report were, unfortunately, not binding either.[145] Therefore, if the dispute re-

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135 *Id.* § 7, First, 44 Stat. at 582.

136 RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 48.

137 *See id.* If the chosen partisan arbitrators could not agree on the neutral members within five days, the Board of Mediation would appoint the neutral(s). *See* RLA, Pub. L. No. 69-257, § 7, Second, (a), (b), 44 Stat. 577, 582-83.

138 *See id.* § 9, Second, 44 Stat. at 585.

139 RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 49 (quoting section 10 of the RLA).

140 *See* RLA, Pub. L. No. 69-257, § 10, 44 Stat. 577, 586-87.

141 *See id.*

142 *See* RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 49.

143 *See id.*

144 *Id.* (quoting section 10 of the RLA).

145 *See id.*

mained unresolved after thirty days, either party was free to engage in self-help.[146]

B. THE 1934 RLA AMENDMENT

While the RLA was successful to a point, the lack of a compulsory dispute resolution mechanism proved to be a major weakness in the procedures for handling minor disputes. This fundamental flaw resulted in two main problems. First, adjustment boards did not hear a significantly large number of minor disputes because the parties could not agree to engage in such action. Second, there were many unresolved minor disputes due to a deadlocked Adjustment Board panel. As the Report of the House of Representatives Committee on Interstate and Foreign Commerce stated, after hearings on the 1934 amendment: "In many instances, however, the carriers and the employees have been unable to reach agreements to establish such boards (of adjustments)."[147] And "[m]any thousands of these [minor] disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked."[148] The state of the rail industry resulting from a lack of compulsory mechanisms under the RLA seemed in stark contrast to its declared purpose of the 1926 Act, which was "to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employee thereof."[149] The House Report continued:

> These unadjusted disputes [referring to minor issues] have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest

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146 *See id.*

147 REPORT OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, WITH AMENDMENTS ON H.R. 9861, H.R.Rep. No. 73-1944, 918 (1934) [hereinafter REPORT].

148 *Id.*

149 RLA, Pub. L. No. 69-257, § 2, First, 44 Stat. 577, 577-78.

> of industrial peace and of uninterrupted transportation service.[150]

In response to these problems, Congress enacted the 1934 amendment to the RLA. The amendment provided for the creation of national Adjustment Boards and provided for the arbitration of partisan members' deadlocks.[151] One of the new boards created out of the amendment was called the National Railroad Adjustment Boards (NRAB), which consisted of four divisions with a total of thirty-four partisan members.[152] The establishment of the NRAB made it unnecessary for the parties to agree to establish their own boards.[153]

The 1934 amendment gave the NRAB jurisdiction over all disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . [including minor disputes that could not be resolved after being] handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes."[154] "If the partisan members of the division were unable to reach a decision, the NRAB was to select a referee to sit with the division to 'make' the award."[155] "Either party could request the NRAB to resolve a dispute, and the Board's orders were enforceable in court."[156]

Finally, the 1934 amendment replaced the Board of Mediation with a new National Mediation Board, which consists of

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150 REPORT, *supra* note 147, at 920.

151 *See id.* Other amendments that do not pertain to this article's discussion include the prohibition against interference with the employees' freedom of association, and provide a dispute resolution method among employees as to who were their representatives for purposes of the RLA. *See id.* at 918. Also, the amendment incorporated into the RLA the Bankruptcy Act's and Emergency Railroad Transportation Act's prohibition against unilateral changes. *See id.*

152 *See id.* at 924-25, 45 U.S.C. § 153, First. Fifty percent of the Board were to represent the railroads, and the other fifty percent were to represent the employees. *See* REPORT, *supra* note 147, at 924.

153 *See id.* at 924. Section 2, Second, authorizes carriers or groups of carriers and their employees to agree to the establishment of system, group or regional boards of adjustment similar to those in the 1926 Act. These boards can have coextensive jurisdiction with the National Board, but the existence of the latter insures against accumulation of disputes through the local boards' ineffectiveness. *See id.* at 922.

154 RLA Amendments of 1934, Pub. L. No. 73-442, §3, First (i), 48 Stat. 1185, 1191 (1934).

155 RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 52 (referring to Pub. L. No. 73-442, § 3, First (i), 48 Stat. at 1191).

156 RAILWAY AND AIRLINE LABOR LAW COMM., *supra* note 21, at 52 (referring to Pub. L. No. 73-442, § 3, First (i), (p), 48 Stat. at 1191-92).

three rather than five members as under the 1926 RLA.[157] The President appoints the three members with the consent of the Senate, and no more than two of the three can be from the same political party.[158] Minor disputes were eliminated from the functions of the Mediation Board; however, the Mediation Board can still engage in a minor dispute case if "any labor emergency is found by it to exist at any time."[159] The Mediation Board enters these cases solely on its own initiative and "cannot be called into the dispute by either both of the parties or by an employee or group of employees, as is true for disputes not within the jurisdiction of the Adjustment Board."[160]

Note that the 1934 amendments were made with the full support of the national railway labor organizations.[161] Both sides were fully aware what the 1934 amendments consisted of and what the consequences of the amendments would be. Moreover, the amendments were an agreement between the carriers and labor to abide by the new terms, similar to the agreement struck in the original 1926 RLA. Therefore, the arms-length agreement between the two parties provides a compelling reason to hold both parties to the terms of the amended RLA, since it is quasi-contractual in nature. Commissioner Joseph B. Eastman, Federal Coordinator of Transportation and principal draftsman of the 1934 amendment, complimented the unions on conceding the right to strike over minor disputes in favor of the Adjustment Board procedures: "The willingness of the employees to agree to such a provision is, in my judgment, a very important concession and one of which full advantage should be taken in the public interest. I regard it as, perhaps, the most important part of the bill."[162]

IV. WHAT CONSTITUTES AN ILLEGAL STRIKE UNDER THE RLA?

Under the RLA, there are two general circumstances in which a labor union's strike is illegal. These two categories involve

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[157] *See* RLA Amendments of 1934, § 4, First, 48 Stat. at 1193-94.

[158] *See id.* § 4, First, 48 Stat. at 1194.

[159] Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co., 353 U.S. 30, 37 n.14 (1957); RLA Amendments of 1934, § 5, First (b), 48 Stat. at 495; 45 U.S.C. § 155, First (b).

[160] *Chicago River*, 353 U.S. at 34 n.14.

[161] *See Railway Labor Act Amendments: Hearings on H.R. 7650 before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 16 (1934).

[162] *Id.* at 47; *Chicago River*, 353 U.S. at 37.

strikes over major disputes and minor disputes. Since this comment is only concerned with the illegality of minor disputes, the issues surrounding major disputes will not be discussed in detail.[163]

For minor disputes, a no-strike obligation exists under section three of the RLA, which mandates compulsory adjustment or arbitration of all grievances or other minor disputes arising out of the interpretation or application of agreements.[164] The Supreme Court case of *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.* was the first time the Supreme Court addressed the issue of compulsory arbitration over minor disputes.[165] The Court engaged in a detailed analysis of the legislative intent and application of the RLA's statutory provisions.[166] The issue in *Chicago River* between the carrier and the union involved an accumulation of twenty-one grievances filed by union members involving nineteen claims for additional compensation, one claim for reinstatement to a higher position, and one claim for reinstatement in the employ of the carrier.[167] After the Court characterized the dispute as minor, it then proceeded to analyze whether the RLA compelled arbitration of a minor dispute.[168] The Court looked to the statutory language of Section 3, First (i), which provides:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreement concerning rates of pay, rules, or working conditions shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes . . . . [If the parties are unsuccessful in resolving the dispute, the provision contin-

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[163] Notwithstanding the fact that this comment is focused on minor disputes, the same analytical logic utilized to justify or preclude employers from receiving economic sanctions against labor unions for illegal strikes under the RLA can be extended to major disputes, especially if one accepts that there are reciprocal obligations under a quasi-contractual theory for damages.

[164] *See* 45 U.S.C. § 153(j) (1994).

[165] 353 U.S. at 30.

[166] *See id.* at 35-40. While compulsory arbitration may be easily overlooked since there has been a Supreme Court ruling concerning this issue on record since 1957, it is nonetheless essential to assert. This is so because an employer cannot seek either injunctive or monetary relief, unless the employer can demonstrate that a right has been violated. This principle—in order to have a remedy you must have sustained a violation of a vested right—dates back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[167] *Chicago River*, 353 U.S. at 32.

[168] *See id.* at 33.

> ues] . . . . [B]ut, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate adjustment division of the (National Railroad) Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.[169]

Additionally, the Court considered Section 3, First (m) of the RLA, which declares "[t]he awards of the several divisions of the Adjustment Board . . . shall be final and binding upon both parties to the dispute . . . ." The Court found this statutory language to be "unequivocal" in holding "Congress had set up a tribunal to handle minor disputes which have not been resolved by the parties themselves."[170] In reaching its decision, the Court relied heavily on comments made during hearings before the House and Senate when Congress was considering enacting the 1934 amendment.[171] In particular, the Court placed emphasis on the comments of Joseph B. Eastman, the Federal Coordinator of Transportation and a principal drafter of the 1934 amendment. When asked by the House of Representatives whether the RLA, as amended, would make it a discretionary matter whether minor disputes would be submitted to the Adjustment board, he responded in the negative by stating it was a matter of duty:

> [a]nd it is my understanding that the employees in the case of these minor grievances—and that is all that can be dealt with by the adjustment board—are entirely agreeable to those provisions of the law. I think that is a very important concession on their [the labor unions] part . . . [T]his law is in effect an agreement on the part of the parties to arbitrate all of these minor disputes.[172]

The Court also relied on statements made by George M. Harrison, who was the chief spokesman for the railway labor organizations in front of both the House and Senate Committees concerning the 1934 RLA amendment. Before the House hearings, Mr. Harrison testified and acknowledged that under the proposed 1934 RLA amendment, an adjustment board would

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169 *Id.*; Railway Labor Act Amendments of 1934, § 3, First (m), 48 Stat. at1191.

170 *Chicago River*, 353 U.S. at 33.

171 *See id.* at 37.

172 *Id.* at 38 (quoting *Railway Labor Act Amendments: Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce*, at 58-60).

hear minor disputes.[173] Mr. Harrison testified to the following before the Senate Committee:

> Grievances are instituted against railroad officers' actions, and we are willing to take our chances with this national board because we believe, out of our experience, that the national board is the best and most efficient method of getting a determination of these many controversies that arise on these railroads between the officers and the employees. These railway labor organizations have always opposed compulsory determination of their controversies. . .[*W]e are now ready to concede that we can risk having our grievances go to a board to have them determined, and that is a contribution that these organizations are willing to make.*[174]

Based upon this record, the Court was convinced there was a mutual agreement and understanding between both parties to the 1934 amendment "that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field [minor issues]."[175] Therefore, if rail labor and management fail to resolve minor disputes on their own, they must be submitted to the National Railroad Adjustment Board for "final and binding determination,"[176] thereby rendering a strike over a minor dispute unlawful.[177]

Accordingly, since a strike over a minor dispute has conclusively been rendered illegal under the RLA, the next question is how the courts enforce adherence to the RLA's provisions.

V. HOW THE COURTS HAVE ENFORCED THE NO-STRIKE OBLIGATION FOR MINOR DISPUTES UNDER THE RLA

A. Enforcement by Injunction

Ironically, the RLA does not specifically provide for an express right of action to enforce its provisions. Therefore,

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[173] *See Chicago River*, 353 U.S. at 38 (quoting *Railway Labor Act Amendments: Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce*, at 81-82).

[174] *Chicago River*, 353 U.S. at 38-39 (quoting *Railway Labor Act Amendments: Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 33, 35 (1934))(emphasis added).

[175] *Chicago River*, 353 U.S. at 39.

[176] 45 U.S.C. § 153, First (i). Although section 3 of the RLA does not extend to the airline industry, courts have construed the 1936 amendment of the RLA, which provides for a system of regional boards of adjustment for that industry, to prescribe mandatory arbitration for minor disputes. *See generally* International Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc., 372 U.S. 682 (1963).

[177] *See Chicago River*, 353 U.S. at 163.

throughout the history of the RLA, the courts have relied upon an "implied remedy" theory to enforce the provisions of the RLA against both the carriers and the unions. The Supreme Court first developed the "implied remedy" theory when it was faced with the problem of enforcing the RLA's provisions against a carrier in the case of *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks.*[178] In this case, labor sought an injunction against the carrier to prevent the carrier from illegally interfering with the union's recruitment of potential members.[179] The Court noted the lack of enforcement provisions within the RLA, but held that it would not hesitate to prohibit conduct which would directly thwart the purpose and function of the legislation in question.[180] Accordingly, since the carrier's actions were in clear violation of the RLA, the Court held that the issuance of an injunction against the carriers was appropriate.[181] The court supported its holding by relying on the time-tested principal established in *Marbury v. Madison*, which is "where a right is created, a remedy exists for the violation of that right."[182] While this case centered on a union seeking enforcement through injunction, and not a carrier seeking damages, it is still important for holding that a specific damage provision is not necessary for a court to enforce the RLA provisions. Therefore, this case should render inadequate the argument that compensatory damages should not be available to carriers against unions for striking over minor issues since the RLA does not explicitly provide for damage remedies. The courts, however, have been quite reluctant to adopt this logic as will be illustrated in a subsequent discussion.

In 1957, the Supreme Court considered for the first time whether a carrier could be awarded an injunction enjoining a union from striking over a minor issue in violation of the RLA. This issue arose in the *Chicago River* case.[183] In deliberating upon this issue, the Court first cited the major weakness of the 1926 version of the RLA, which was the lack of compulsory reso-

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[178] 281 U.S. 548 (1930).

[179] *See id.* at 554. The RLA sections that the union alleged the carriers were violating are set forth in the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577, 45 USCA §§ 151-163. *See id.*

[180] *See id.* at 568.

[181] *See id.* at 569-70.

[182] *Id.* at 569-70 (quoting *Marbury*, 5 U.S. at 162-63).

[183] *See Chicago River*, 353 U.S. at 30.

lution procedures for handling minor disputes.[184] The Court then went on to say that the RLA 1934 amendment was designed to correct this deficiency by compelling the resolution of minor grievances through arbitration, thus avoiding disruptive strikes in the rail industry.[185] The Court consulted the legislative history of the 1934 amendment and concluded that it was made with the complete concurrence and understanding of the labor unions that strikes over minor issues would be prohibited.[186] Based upon the labor union's full compliance with Congress's adoption of the 1934 amendment and the failings of the RLA prior to the amendment, the Court upheld the issuance of the injunction against the union for striking over a minor issue.[187] This decision set forth the precedent of giving carriers the ability to seek union compliance with the statutory provisions of the RLA through judicial enforcement.

B. Enforcement by Damages and Judicial Justifications For Not Awarding Damages to Carriers

Since the original RLA was passed in 1926, there have been few cases tackling the issue of whether carriers are entitled to damages from unions for strikes that are in violation of the legislation. All of these cases with but one exception, however, have consistently stood for the proposition that carriers are not entitled to damages.

One of the first cases to address this issue was the Fifth Circuit case of *Louisville & Nashville Railroad Co. v. Brown*,[188] decided one year after *Chicago River*. In *Brown*, the Nashville Railroad Company brought suit against its employees to recover damages

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184 *See id.* at 35.

185 *See id.* at 36-37.

186 *See id.* at 37. The Court quoted Commissioner Joseph B. Eastman, Federal Coordinator of Transportation and principal draftsman of the 1934 amendment, as well as the chief spokesman for the railway labor organizations, George M. Harrison. Both men testified in hearings before the House of Representatives Committee on Interstate and Foreign Commerce on H.R. 7650 and acknowledged that strikes over minor issues would be prohibited under the 1934 amendment to the RLA, and that the labor unions understood what the effect of the amendment would be concerning the resolution of minor issues. *See Chicago River*, 353 U.S. at 37-39.

187 *See id.* at 42. Additionally, the Court held that the Norris-La Guardia Act's ban on federal injunctions against labor unions was not applicable because the union's conduct in that case was unlawful under another statute–the RLA. *See id.* at 42 n.24.

188 252 F.2d 149 (1958).

sustained from an illegal three-day strike over a minor issue.[189] The three-day strike resulted in damages amounting to $250,000.[190] No labor organization was a party to the litigation.[191] While it was determined that fourteen employees acted in concert to organize the strike, it was orchestrated by the actions of individual employees, and was not authorized by any railroad brotherhood.[192] Additionally, the carrier never sought to enjoin the strike, but instead waited until the strike was resolved to bring suit to recover the damages sustained as a result of the strike.[193]

In its analysis, the Fifth Circuit concluded that *Chicago River* applied, and stated that "had an injunction been sought because the strike was illegal, it would lie to prevent the frustration of the statutory grievance [minor issue]-adjustment procedure."[194] The *Brown* court, however, held that a statutory right of action for damages was not available for breach of the duty to arbitrate minor issues, due to the absence of an express statutory provision.[195] The court reinforced this conclusion based on the fact that Congress had always expressly enabled parties to seek monetary damages in similar statutes. Therefore, since Congress did not expressly provide a statutory right of action for carriers against unions or employees for striking over minor issues in violation of the RLA, the *Brown* court held: "[w]e do not think that Congress here intended to or did create a new statutory right of action for damages of the nature declared upon by the plaintiff."[196]

Even though the *Brown* court stated that it was following the *Chicago River* holding, it is hard to justify this statement. *Chicago River* appeared to set forth the proposition that just because the RLA does not expressly provide for a particular remedy, a court may fashion a remedy to fit the breach. Thus, it is difficult to reconcile *Brown* with *Chicago River.* Furthermore, reliance on *Brown* as precedent, with respect to its analogy to civil rights, seems inappropriate. As discussed above, the *Brown* court noted

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189 *Id.* at 150-51.

190 *See id.* at 151.

191 *See id.* at 150.

192 *See id.* at 150, 157.

193 *See id.* at 150.

194 *Brown*, 252 F.2d at 154.

195 *Id.* at 155. The court cited to 29 U.S.C.A. § 187 and also several civil rights statutes including 42 U.S.C.A. §§ 1983, 1985, and 1986 as examples of statutes that expressly provide for damages as a remedy for statutory violation. *Id.*

196 *Id.*

that damages were not available for civil rights suits; therefore, by analogy, damages should not be available to carriers for a union's breach of the RLA.[197] This particular justification for denying carriers a cause of action for damages against unions is no longer valid. The Supreme Court has subsequently held that all remedies, including damages, are available to redress deprivation of civil rights.[198] Moreover, the Supreme Court decision in *Franklin v. Gwinnett County Public Schools*[199] specifically overruled *Brown* by holding that all remedies, including damages, are to be available unless Congress clearly provides the contrary.[200]

Other justifications are given for denying damage awards to carriers. One main concern courts have is fear of creating an imbalance of power between carriers and unions—a consistent theme throughout the history of the RLA. For example, *National Airlines, Inc. v. Airline Pilots Ass'n International* displays this concern.[201] *National Airlines* involved a carrier seeking to recover compensatory damages against a union for an illegal strike over a minor issue.[202] Interestingly, the carrier had previously prevailed in enjoining the union from conducting its improper strike. But unsatisfied, the carrier further sought to recover financial damages it suffered from the union's illegal strike.[203] The Florida Federal District Court relied upon *Brown* to conclude that Congress did not intend for carriers to recover monetary damages against unions for breaching the RLA.[204] The *National Airlines* court stated that "[s]ince the Brown decision, there have been no reported cases on this question, nor has Congress enacted legislation which even suggests its intent to create a right of action for damages."[205] In addition to relying upon *Brown*, the *National Airlines* court also proposed some policy considerations for not allowing carriers to recover monetary damages against unions for breaching their duties under the RLA. The *National Airlines* court stated:

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197 *Id.* at 155.

198 *See* Dennis Alan Arouca, *Damages for Unlawful Strikes Under the Railway Labor Act*, 32 HASTINGS L.J. 779, 793 (1981) (citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969)).

199 503 U.S. 60 (1992).

200 *See id.* at 66.

201 431 F.Supp. 53 (S.D. Fla. 1976).

202 *Id.* at 54.

203 *See id.*

204 *See id.*

205 *Id.*

> [T]he Court is of the opinion that policy considerations . . . are as tenable today as when Brown was decided. The life cycle of labor-management bargaining is heated and oftentimes results in bitter accusations. Representatives attempt to secure the best possible terms for their respective sides. To create a right of action in favor of an employer against a union and its collective bargaining representatives for losses the former incurs in the course of the collective bargaining process would, in effect, give the employer a weapon with which to keep the unions and their agents "in line." Surely, neither Congress nor the Appellate Courts would fashion a remedy which would give the employer a lever upon which to gain such an unfair advantage.[206]

Thus, it would seem that the *National Airlines* court was fearful of upsetting the balance of power between the carriers and unions. It is interesting to note that the *National Airlines* decision was rendered in 1976. Moreover, the *National Airlines* court observed that policy considerations had not changed from the time the *Brown* decision was rendered in 1959. Accordingly, and based upon the logic of the *National Airlines* court, an award of monetary damages against the unions would be appropriate if there was a shift of power weighing against the carriers.

Until 1995, research revealed only one case in the history of the RLA that awarded damages for the carrier to remedy a violation of the minor dispute no-strike duty. This case was the 1960 case of *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen.*[207] In this case, the district court found the union's strike over a minor issue unlawful and awarded damages to the carrier based upon its lost traffic. This case went all the way to the Supreme Court in 1967 and the damage award was upheld. Unfortunately, the only issue on appeal was venue and therefore the Court did not squarely address whether the district court damage award was valid under the RLA.[208] It can be argued, however, that the Supreme Court was aware of the damage award issued by the district court, because the Court discussed the background of the case prior to discussing venue.[209] The Court's silence on the lower court's damage award *may* be considered an implicit acceptance of the principle that the

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[206] *Id.*

[207] 185 F. Supp. 369 (D. Colo. 1969). Unfortunately, this district court case was not a published opinion.

[208] *See* Denver & Rio Grande W. R.R. Co. v. Brotherhood of R.R. Trainmen, 387 U.S. 556 (1967).

[209] *See id.* at 557-58.

courts should enforce the no-strike obligations of the RLA with whatever means appropriate on a case-by-case basis.[210]

C. Recent Decisions Concerning the Appropriateness of Damage Awards Under the RLA

Recently, four cases have precisely addressed whether damages are an appropriate remedy under the RLA, and all but one have held unfavorably towards the carriers. The first case is the 1992 Fifth Circuit case of *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees.*[211] This case involved a railroad that sought both injunctive and monetary relief against a union for an illegal strike over a minor issue.[212] The railroad sought reimbursement for lost revenue over a 24-hour period for which the illegal strike spanned.[213] The Fifth Circuit analyzed the applicability of its previous holding in *Brown* to the issue in *Burlington.* In the latter case, the railroad attempted to distinguish *Brown* by arguing that *Brown* was limited to its facts, which consisted of an employer suing individual employees rather than a union. The *Burlington* court dismissed this argument by stating:

> While the factual situations may differ, the holding in Brown was not limited to its particular facts. Furthermore, we see no reason to so limit the holding of Brown. Indeed, other courts have recognized Brown as holding that there is no cause of action against a union for damages for a breach of the § 152 First duty.[214]

The railroad then contended that "Brown did not consider whether damages could be awarded as part of equitable relief."[215] The railroad based this argument on the Fifth Circuit's ruling in *United Industrial Workers of the Seafarers International Union of North America v. Board of Trustees of Galveston Wharves*[216] which held that "monetary relief may be awarded as part of the

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[210] *See* Arouca, *supra* note 198, at 792. Arouca makes this very argument; however, the opposite position is that the Court was just following its regular practice of not engaging an issue unless it is directly appealed to the Court for consideration. The Sixth Circuit adopted this latter position in the case of CSX Transp. Inc. v. Marquar, 980 F.2d 359 (6th Cir. 1992).

[211] 961 F.2d 86 (5th Cir. 1992).

[212] *See id.* at 87.

[213] *See id.* at 88.

[214] *Id.*

[215] *Id.*

[216] 400 F.2d 320 (5th Cir. 1968).

equitable relief ordered by the court."[217] The *Burlington* court distinguished the equitable argument in *Galveston Wharves* by noting that the monetary award in *Galveston Wharves* was in response to a violation of 45 U.S.C. § 156, whereas *Brown* addressed a violation of 45 U.S.C. § 152, First.[218] The *Burlington* court went on to hold that the railroads in both *Burlington* and in *Brown* were seeking identical relief—the railroads wanted to recover the money it lost as a result of an illegal strike.[219] Therefore, *Galveston Wharves* was not applicable since it involved a union seeking back pay from a carrier in violation of section 156 of the RLA.[220] The *Burlington* court ruled *Brown* to be the applicable precedent and denied the railroads monetary damages.[221] The only reason the *Burlington* court offered for denying the monetary damages was that section 152[222] of the RLA is different than section 156.[223]

This rationale, however, does not answer the question of why mutual remedies should not be available under the RLA since mutual obligations are imposed. Dennis Arouca has argued quite persuasively that since there are equal, mutual obligations on both carriers and unions to abide the RLA, and because courts have had little trouble granting damage remedies under the RLA in favor of unions and their members against carriers for violating RLA provisions, a carrier should receive damage awards against a union that conducts an illegal strike.[224] Arouca specifically cites to *Galveston Wharves*, where the court awarded damages in the form of back pay because the carrier violated the status quo provision, RLA section 156.[225] According to Arouca's article, "the Fifth Circuit reasoned that such a remedy was the only 'fair and practicable' remedy to return the employees to the same position that they would have been in if they [the car-

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[217] *Burlington*, 961 F.2d. at 88. "In *Galveston Wharves* the court awarded back pay to employees who were wrongfully discharged when the carrier unilaterally altered the terms of a collective bargaining agreement without following the procedures dictated by" section 156 First of the RLA. *Id.*

[218] *Id.*

[219] *Id.* at 89.

[220] *See id.* at 88.

[221] *Id.* at 89.

[222] 45 U.S.C. § 152 imposes the no-strike obligation against unions concerning minor issues.

[223] 45 U.S.C. § 156 concerns the carrier's and the union's respective duties to maintain the status quo while negotiating changes in collective bargaining agreements.

[224] *See* Arouca, *supra* note 198, at 794.

[225] *See id.*

rier] had not violated the Act."[226] Therefore, why not hold the unions to the same standard?

In addition to the Fifth Circuit, the District of Columbia has implied that damage awards in favor of unions are appropriate under the RLA.[227] In *Bangor & Aroostook Railroad v. Brotherhood of Locomotive Firemen and Enginemen,*[228] the court awarded damages to a labor union for lost dues because the carrier changed employment conditions prior to exhausting the major dispute mechanisms of the RLA.[229] Arouca persuasively demonstrated that both the Fifth Circuit and the District of Columbia Circuit arrived at their decisions to award damages against the carriers because the carriers violated their duties imposed by the RLA, "*duties which are reciprocal to the employees' obligation not to strike.*"[230]

Arouca supports his proposition that obligations under the RLA are reciprocal by referring to the Supreme Court's opinions in *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*[231] and in *Chicago River.*[232] In both cases, the Supreme Court acknowledged that the "reciprocal nature of these RLA obligations is central to the design of the Act and is necessary to make the Act's procedures work."[233] Therefore, since there is compelling precedent establishing the reciprocal nature of RLA obligations, the RLA "deserves a remedial structure capable of sustaining the reciprocal rights contained in that obligation."[234] Arouca concludes by warning "[i]f damages are unavailable to a carrier when such a remedy is available to its employees and their representatives, this asymmetry may frustrate the proper exercise of duties and responsibilities by management and labor and may undermine collective bargaining."[235]

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[226] *Id.* (quoting *Galveston Wharves,* 400 F.2d at 326).

[227] *See id.* at 794-95.

[228] 442 F.2d 812 (D.C. Cir. 1971).

[229] *See* Arouca, *supra* note 198, at 795. Arouca mentions that the *Bangor* court did not even discuss *Brown* in reaching its conclusion that a damage award for unions could be implied from the language and congressional intent of the RLA. *See id.*

[230] *Id.* (emphasis added).

[231] 396 U.S. 142 (1969).

[232] *See Chicago River,* 353 U.S. at 30.

[233] Arouca, *supra* note 198, at 795.

[234] *Id.* at 797.

[235] *Id.*

According to Mr. Jim Parker,[236] Vice-President and General Counsel for Southwest Airlines, the imbalance of power that Arouca cautioned against has already begun to occur with the labor union's implementation of the CHAOS strike system and the recent APA sick-out strike.[237] In Mr. Parker's opinion, no deterrent currently exists to prevent a union from breaching its no-strike obligation under the RLA without the carriers' ability to seek compensatory damages resulting from illegal strikes. Mr. Parker suggests the following hypothetical as an illustration. Suppose the AFA (Association of Flight Attendants) and airline management are negotiating over a minor issue during the Christmas holiday. During the negotiating phase and prior to compulsory arbitration, the AFA employs its CHAOS strike system on Christmas Eve for two hours. The two-hour flight attendant strike would cause long delays in an already hectic flight schedule, possible flight cancellations, and potentially millions in lost revenues and goodwill.[238] Moreover, Mr. Parker regarded an injunction as useless. First, the likelihood of airline management locating a federal judge at 8:00 p.m. on Christmas Eve to obtain an injunction preventing the sudden strike would be close to impossible. Second, an injunction would not allow management to recover the above-listed damages suffered as a result of the illegal union strike over a minor issue. The only equitable solution in this situation would be for courts to award compensatory damages to carriers against illegal union strikes over minor issues. Additionally, Mr. Parker indicated that the lack of damage awards seemingly contradicts the RLA's historical evolution. As previously discussed, the most serious shortcoming of all the pre-1934 RLA legislative enactments was the absence of compulsory arbitration mechanisms for minor disputes. Without the carriers' ability to seek monetary damages against unions for illegal strikes in violation of section 152, First of the RLA, the unions have no incentive to follow the minor

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[236] Interview with Mr. Jim Parker, Vice-President and General Counsel, Southwest Airlines, Inc., in Dallas, TX. (Feb. 12, 1999). I would like to thank Mr. Parker for his time and his thoughts regarding the topic of this comment. I believe first hand industry insight provides probably the best and most unique perspective and Mr. Parker's input is greatly appreciated.

[237] *See* Carey, *supra* note 1; Maxon, *supra* note 9.

[238] Mr. Parker indicated that lost goodwill is especially a concern of the airline industry for selective strikes over the holiday season. This type of damage, while not precisely accounted for, can be severe due to the mistrust customers would likely develop for the respective carrier after missing a flight to see their loved ones over the holiday season.

dispute resolution mechanisms the RLA mandates. Without the availability of damage awards, the RLA is arguably in the same position as it was before its amendment in 1934.[239]

The most serious and detailed judicial analysis of this article's issue to date occurred in the 1992 Sixth Circuit decision of *CSX Transportation Inc. v. Marquar*.[240] While ultimately holding against management, the *Marquar* court intimated that a chink in the status quo position armor may exist by holding that the possibility of a pro-management damage remedy was within the court's discretion to determine on a case-by-case basis.[241] The central issue presented in *Marquar* was whether a railroad could recover compensatory damages directly sustained in connection with a union strike over a minor dispute.[242] The minor dispute concerned how union employees' enjoyed their lunch arrangements.[243]

In its analysis, the *Marquar* majority confronted two fundamental issues of first impression due to the absence of a published opinion allowing such damages in the RLA's 66-year history.[244] The first issue was, "[G]iven the RLA's silence on remedies, are damages ever available for violations of the Act?"[245] The second issue was if damages are available, are they "appropriate for this type of violation?"[246] With respect to the first issue, the *Marquar* majority relied heavily upon legislative history[247] and a 1992 Supreme Court case concerning a Title IX

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[239] Mr. Parker acknowledges that airline management could permanently enjoin a particular union from conducting illegal strikes in the future. Such an injunction would not violate the Norris-La Guardia Act because a strike over a minor issue violates an already existing law—the RLA. Mr. Parker believes a permanent injunction would prevent illegal strikes from reoccurring due to the union's reluctance to be cited for contempt of court for violating such an injunction. But a permanent injunction is reactive and not proactive, which keeps the imbalance of power in the unions' favor. Furthermore, an injunction does not address the potentially huge losses airlines would sustain from a strike organized in the CHAOS fashion, as Mr. Parker's illustration above indicates.

[240] 980 F.2d 359 (6th Cir. 1992).

[241] *Id.* at 379-80.

[242] *Id.* at 360.

[243] *See id.*

[244] *Id.* at 379. The opinion noted Denver & Rio Grande W. R.R. v. Brotherhood of R.R. Trainmen, 367 F.2d 137, but dismissed it as non-persuasive because it was not a published opinion, and because it lacked a discussion on the damages issue at the Supreme Court level. *See id.* at 381.

[245] *Marquar*, 980 F.2d at 379.

[246] *Id.*

[247] *Id.* at 379-80. The *Marquar* court placed great weight on the statements made by Donald Richberg, who was the labor unions' counsel appearing before

action[248] to hold that "damages are available under the RLA in appropriate cases," with appropriateness determined on a case-by-case basis.[249] This holding is significant because it directly overrules *Brown*,[250] which held damage remedies were never appropriate for carriers under the RLA due to the lack of an express statutory provision allowing such damage remedies.[251] From management's perspective, it appears *Marquar* has begun to break down previous judicial fortifications by not ruling out the possibility of recovering losses sustained directly from illegal union strikes over minor issues.

In analyzing whether a damage award was appropriate in this instance, the *Marquar* court was aware that it was breaking new ground.[252] Specifically, the court stated, "[i]n the 66-year history of the RLA, no federal court has published an opinion holding that a union may recover damages from a railroad or that a railroad may recover damages from a union."[253] The *Marquar* court qualified this finding by distinguishing the Fifth Circuit's *Galveston Wharves*[254] decision on the basis that it concerned the issue of backpay.[255] The *Marquar* court considered back pay "an equitable remedy because it represents a benefit wrongfully withheld."[256] Furthermore, and without explanation, the *Marquar* court dismissed as inapplicable instances where damage remedies were rendered against management for violating its RLA obligation not to interfere with fair employee representation.[257] The court then revisited the precedents of not allowing damage awards for carriers discussed

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the House Commerce Committee considering the adoption of the 1926 RLA. Of particular importance was Mr. Richberg's statement that "the law for such enforcement or compulsion should be developed in the courts." *Id.* at 380 (quoting *Hearings on H.R. 7180 Before the House Comm. on Commerce*, 69th Cong., 1st Sess. 40 (1926)).

248 *See id.* at 379 (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 66 (1992), which held that "once an implied right of action has been found (under federal statute), a court must 'presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise.'").

249 *Marquar*, 980 F.2d at 379.

250 252 F.2d at 149.

251 *See id.* at 155.

252 *Marquar*, 980 F.2d at 380.

253 *Id.*

254 400 F.2d at 320.

255 *Marquar*, 980 F.2d at 380-81.

256 *Id.* at 380.

257 *Id.*

above and set forth in *Chicago River*[258] and *Brown*,[259] and also addressed the policy concern of creating too much power for management.[260] Based upon this history, the court noted that "Congress intended for the courts to set up a 'common law' for the appropriate enforcement of the RLA."[261] The court stated:

> Congress envisioned that the courts would set up a body of law to enforce the RLA. The resulting body of law has not permitted railroads and unions to recover damages against each other generally and, particularly, in the situation presented in this case. After 66 years, a court should be reluctant to change the balance that has been struck between railroads and unions. At a minimum, a party requesting such a change should be required to demonstrate why the remedies that have been appropriate for 66 years are no longer good enough . . . .
> An award of damages would change the careful balance between labor and management that has evolved in the 66 years since the RLA was enacted. Since CSX has not shown that any change in the industry or the law warrants such a result, we AFFIRM the decision of the district court to dismiss CSX's claim for damages.[262]

Admittedly, the majority opinion in *Marquar* is perplexing. On one hand, the majority states monetary damages are available under the RLA. But on the other, the majority fatally restricts a court from rendering such an award. As Judge Batchelder noted in his dissenting opinion, he read the majority opinion to stand for the following:

> (1) [W]hile monetary damages are available under the RLA, (2) monetary damages can never be appropriate to remedy the damage resulting to a railroad from an illegal strike over a minor dispute, and (3) that for such damages to be held to be appropriate, the railroad must demonstrate their appropriateness, which (4) the railroad in this case has failed to do. I believe that this holding is intrinsically inconsistent.[263]

While the majority opinion in *Marquar* is confusing, it does not appear to completely exclude the possibility of management recovering a damage award. In fact, at least in the Sixth Circuit and in reliance upon *Marquar*, one might make a strong case by

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258 353 U.S. at 30.
259 252 F.2d at 149.
260 *See Marquar*, 980 F.2d at 381-82.
261 *Id.* at 380.
262 *Id.* at 381-82.
263 *Id.* at 378.

illustrating the industry changes with respect to technological and communication advances that have led to the evolution of unions employing strike schemes such as CHAOS and sick outs without the fear of any consequences other than an injuction.

Though the majority opinion in *Marquar* appeared to break new ground by allowing for the possibility of monetary damages for unions, the decision is most noteworthy for Judge Batchelder's vigorous dissent. Judge Batchelder ardently advocated that management should receive money damages where losses result directly from a union's illegal strike over a minor issue.[264] Judge Batchelder first reasoned, despite the RLA's silence on providing an explicit right of action when a union strikes over a minor issue, that the Supreme Court in *Chicago River* implied that a right of action existed by holding an injunction proper to prevent an illegal strike.[265] Therefore, since "an implied cause of action already exists under the RLA in this situation, *Franklin* dictates [a presumption] that all 'appropriate' remedies are available 'unless Congress has expressly indicated otherwise.'"[266] Judge Batchelder extensively cited legislative history, as well as the Supreme Court's disposition at the time of the RLA enactment regarding violated rights and appropriate remedies, and concluded that money damages in favor of management are appropriate under the RLA on a case-by-case basis.[267]

Judge Batchelder's dissent is remarkable due to his analysis of whether a damage remedy is appropriate in CSX's situation. First, Judge Batchelder noted that CSX was not attempting to bypass the RLA's arbitration procedures and "take a minor dispute into federal court in order to get relief not available in the arbitration process."[268] CSX was not simply seeking damages for a minor dispute, but instead was seeking damages resulting from the union's *illegal strike* over a minor dispute.[269] Judge Batchelder commented:

> CSX's claim arises from the union's intentional refusal to follow the RLA's mandate to submit minor disputes to arbitration, with the result that CSX was put in the position of having no recourse

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[264] *See id.* at 359-79.

[265] *See id.* at 363.

[266] *Marquar*, 980 F.2d at 363-64 (quoting *Franklin*, 503 U.S. at 66).

[267] *See id.* at 364-69.

[268] *Id.* at 369.

[269] *See id.* at 369. Judge Batchelder further noted that parties later arbitrated and resolved the lunch dispute pursuant to RLA mechanisms after CSX was awarded an injunction that terminated the illegal strike. *See id.*

> against the strike unless it could bring an action in federal court. Therefore, because the RLA's arbitration procedures were not designed to provide a remedy for damages from a union's illegal strike, the RLA's goals cannot be vindicated unless judicial remedies are provided.[270]

Next, Judge Batchelder identified the inadequacy of an injunction remedy with respect to Mr. Parker's previously discussed hypothetical.[271] Judge Batchelder observed that the RLA's primary goal was "to provide a machinery to prevent strikes."[272] But here, the union "sidestepped the 'machinery to prevent strikes' by striking illegally."[273] Additionally, CSX obtained an injunction the same day the union initiated the strike, but CSX could not obtain an injunction in time to prevent the strike from occurring.[274] CSX's situation is identical to Mr. Parker's hypothetical scenario that illustrated why injunctive relief is no longer sufficient when a union has the capability to coordinate a proficient strike, e.g., CHAOS or a sick-out. The RLA's primary goal of avoiding strikes is completely controverted when a union may strike at will knowing the only consequence will be a mere injunction.[275] Therefore, monetary relief would deter illegal behavior and "make effective the RLA's prohibition against interruptions in service over minor disputes."[276]

Judge Batchelder next addressed the often-cited argument against providing monetary relief, which concerns upsetting the balance of power that has developed over the years between the carriers and the unions. Judge Batchelder phrased his response in terms of a quasi-contractual argument.[277] Because the RLA, and its 1934 amendment establishing the compulsory arbitration provisions, was fashioned in a cooperative effort by both the railroad carriers and the railroad unions, and with the full endorsement of both parties, both parties should be reciprocally held accountable for RLA violations under a theory of quasi-contract.[278] Because damages are typically available for breach

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[270] *Id.* at 370.

[271] *See Marquar*, 980 F.2d at 371-72; *see also supra* text accompanying notes 236-39.

[272] *Marquar*, 980 F.2d at 371 (quoting Texas & N.O.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 565 (1930)).

[273] *Id.*

[274] *See id.*

[275] *See id.*

[276] *Id.* at 371.

[277] *See id.* at 372.

[278] *See Marquar*, 980 F.2d at 372.

of a contract, damages should be available to enforce the joint effort of labor and management.[279] According to Judge Batchelder, appropriately applied damage awards would therefore no more upset the balance of power than the injunctive award rendered in the *Chicago River* decision.[280]

Judge Batchelder further discounted the concern of upsetting the balance of power by providing a compelling display of cases where courts awarded monetary relief against management and in favor of unions, yet did nothing to disturb the balance of power between the carriers and the unions.[281] In addition to those cases, Judge Batchelder cited situations where both railroads and unions have been awarded damages resulting from the arbitration of minor disputes under the RLA minor dispute mechanisms.[282] Given these cases, damages seem even more appropriate and necessary for situations when a union frustrates the RLA's primary goal of avoiding service interruptions, rather than in the cases cited below wherein damages were sought merely as a remedy for a minor dispute.[283]

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279 *See id.*

280 *See id.* at 373.

281 *See id.* Judge Batchelder cited the following situations:

> 1) damages against unions and for employees over a union's breach of duty of fair representation, Steele v. Louisville & N.R. Co., 323 U.S. 192, 234 (1944) . . . ; 2) backpay [awarded] against . . . carrier and for employees, Burke v. Compania Mexicana De Aviacion, 433 F.2d 1031, 1034 (9th Cir. 1970) (implying . . . damages . . . for wrongful discharge); Belton v. Air Atlanta, Inc., 647 F.Supp. 28 (N.D.Ga. 1986) (punitive damages may be awarded against employer for interfering with employees' attempts to organize); . . . Adams v. Federal Express Corp., 470 F.Supp. 1356 (W.D. Tenn. 1979) (backpay available to employee for wrongful discharge [under RLA]), *aff'd*, 654 F.2d 452 (6th Cir. 1981); . . . and 3) damages or backpay for unions . . . against . . . carriers, Bangor & Aroostock R.R. Co. v. Brotherhood of Locomotive Firemen and Enginemen, 442 F.2d 812, 817 (D.C. Cir. 1971) . . . ; *Galveston Wharves*, 400 F.2d at 320 (backpay appropriate for union for employees laid off when employer violated status quo [obligation under RLA]).

Marquar, 980 F.2d at 373.

282 *See id.* (citing McKinstry Co. v. Sheet Metal Workers' Int'l Ass'n, Local Union #16, 859 F.2d 1382, 1384 (9th Cir. 1988) (adjustment board awarded union $19,000); Local 553, Transp.Workers Union v. Eastern Air Lines, Inc., 695 F.2d 668, 675 (2d Cir. 1982) (adjustment board can interpret contract clauses and award monetary damages); Brotherhood of R.R. Trainmen v. Denver & Rio Grande W.R.R. Co., 370 F.2d 833, 836 (10th Cir. 1966) (Board awarded $472,000 to union members against railway)).

283 *See Marquar*, 980 F.2d at 373.

Judge Batchelder also responded to the majority's additional fear that a damage remedy would deter legitimate strike activity by labor unions due to the occasional difficulty in distinguishing between major and minor disputes.[284] Judge Batchelder countered this anxiety by reminding the majority that RLA obligations are mutually reciprocal by their nature.[285] He buttressed his position by illustrating that the availability of monetary damages against the railroads for violating status quo provisions does not chill management negotiating abilities.[286] Therefore, a reciprocal consequence for union violations of the RLA should not chill their negotiating ability. Furthermore, even if a union is uncertain about a dispute being characterized as either major or minor, and, out of fear of being subject to a damage award, opted not to strike, a union still has legitimate alternatives.[287] For example, a union can seek a federal court remedy in the form of an injunction to enjoin management from violating the status quo provision, just as management can.[288] Or a union can simply take the dispute through the compulsory arbitration mechanisms the RLA provides.[289] As Judge Batchelder remarked, "such controversies, therefore, are not the same as those in which the [remedy] strips labor of its primary weapon without substituting any reasonably alternative."[290]

Finally, Judge Batchelder dismissed the common law theory of *stare decisis* precluding the court from awarding damages in this case. Judge Batchelder stated the precedent set forth by *Brown* is clearly mistaken because it "relies on the mistaken belief that Congress must spell out all available remedies when it cares to provide them, and that because the RLA fails to spell out a damages remedy, none exists."[291] This is especially so in light of the *Franklin* holding which rejected that notion.

Judge Batchelder's dissent proved to be persuasive in a subsequent federal district court decision.[292] Relying upon the *Marquar* dissent, the *Conrail* court awarded management damages against a union for illegally striking over a minor issue. As in

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284 *See id.* at 373-74.

285 *See id.* at 374.

286 *See id.*

287 *See id.*

288 *See id.*

289 *See Marquar*, 980 F.2d at 374.

290 *Id.*

291 *Id.* at 377.

292 *See* Consolidated Rail Corp. v. United Transp. Union Gen. Comm. of Adjustment, 908 F.Supp. 258 (E.D. Penn. 1995).

both the majority and dissenting opinions in *Marquar*, the *Conrail* court began its analysis by following *Franklin* to conclude that absent clear congressional direction to the contrary, the federal courts have the power to award any appropriate relief in response to violation of federal statute.[293] The *Conrail* court then proceeded to Judge Batchelder's "compelling review of the legislative history [which established that] Congress intended that 'the courts would enforce the RLA with all available remedies.'"[294] The court then held monetary awards can be appropriate under the RLA. Since *Franklin* and *Marquar* dictate that the determination of a damage award under the RLA is to be made on a case-by-case basis, the *Conrail* court advanced to whether a damage award was appropriate in this particular situation.[295]

In this case, the defendant union had engaged in a series of short-lived, illegal strikes centering on minor issues that occurred over a period of several years.[296] The court first consulted the primary objective of the RLA in analyzing whether a damage award against the union for the illegal strikes was appropriate. The court noted that its primary objective is to "avoid any interruption to . . . the operation of any carrier."[297] For this objective to be achieved, the RLA requires compulsory arbitration of minor disputes, and when illegal strikes occur over those disputes, case law has previously and consistently authorized the judiciary to issue injunctions.[298] At this point, the *Conrail* court correctly recognized the failings of injunctive relief for the proficiently coordinated and short-lived illegal strikes described by Mr. Parker and Judge Batchelder, and written about in the Wall Street Journal. The *Conrail* court stated:

> [S]hould a union engage in a strike or series of strikes, each of short duration, there may be no opportunity for the carrier to obtain injunctive relief before the request for such relief has become moot. Yet, severe damage may have been done. Likewise, even if a railroad does obtain injunctive relief, it may have suffered a significant and quantifiable loss of revenue and extraordinary expenses as a result of the strike or work stoppage before it was ended. Customers, in the meantime, may have turned to

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293 *Id.* at 262.

294 *Id.* at 263 (quoting *Marquar*, 980 F.2d at 367).

295 *Id.*

296 *See id.* at 260.

297 *Id.* at 263 (quoting 45 U.S.C. § 152, First).

298 *See Consolidated Rail*, 908 F. Supp. at 263.

> competing railroads or modes of transportation, never to return. All of this is to say nothing about the harm to the public through the illegal interruption of commerce.[299]

The *Conrail* court concluded that the claim for monetary damages did not fail as a matter of law, notwithstanding the time-tested common law precedent of not allowing such an award.[300] The court reconciled itself with the RLA's common law history by pointing out that most prior cases merely "seem to rely primarily on the fact that damages have never previously been awarded in this situation."[301] In other words, previous courts have *begged the question* when they held damage awards against unions to be improper simply because it had never been done. This contention, as stated by the *Conrail* court, "misses the mark."[302] Such is evident given the Supreme Court's holding in *Franklin*, which emphasized "the traditional presumption in favor of all appropriate relief including damages."[303] Even though the *Conrail* case centered around a railroad strike, it is equally applicable to the airline industry and directly addresses the hypothetical presented by Mr. Parker and Judge Batchelder. Moreover, while this is just one opinion, it may hint that the tide against allowing management to recover damages sustained as a result of illegal union strikes over minor issues may be turning. This is so because it is the most recent decision, as of this article's publishing date, rendered on this issue and it follows Judge Batchelder's compelling dissent in *Marquar*.

As a final example of the need for management to obtain compensatory damages against labor for illegal strikes, it is worthwhile to note Judge Kendall's assessment of how the balance of power has shifted to labor concerning minor disputes. Judge Kendall presided over the dispute between American Airlines and the Allied Pilots Association (APA), and issued a temporary restraining order compelling the APA's pilots to cease from engaging in their illegal sick-out strike.[304] When the APA's pilots defied Judge Kendall's temporary restraining order and continued to call in sick, Judge Kendall held the APA in con-

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299 *Id.*

300 *Id.* at 264. This holding directly contradicts the "intrinsically inconsistent" holding by the *Marquar* majority.

301 *Id.*

302 *Id.*

303 *Id.* (quoting *Franklin*, 503 U.S. at 71).

304 *See* American Airlines, Inc. v. Allied Pilots Ass'n., No. 7:99-CV-025-X, 1999 WL 66186 (N.D.Tex.).

tempt of court and fined the APA $45.5 million for damages sustained by American Airlines from the date that the temporary restraining order was issued.[305] In his contempt order, Judge Kendall remarked that:

> It is this Court's view that a minor labor dispute has been transformed into nothing more than a shakedown. Even though it may indeed be more economical for American to cave in and pay, in the long run, if you pay extortion today, you typically have to pay it tomorrow. When the pitch is 'pay us what we want or we will cost you more,' it is the type of negotiation one usually sees when doing business with one of the five families in New York.[306]

Judge Kendall further commented on the damage illegally inflicted upon American by the APA by saying:

> This illegal sick-out by the Union has cost untold millions of dollars in damages to hundreds of thousands of passengers and businesses in this country. American Airlines may or may not be in the right in the underlying labor dispute, but it is crystal clear the Company is not responsible for the canceled flights, passenger inconvenience, and monetary damages passengers have suffered. The Union is responsible for the damages these passengers have suffered. It is also clear that the Union leadership could care less about these people.[307]

Unfortunately, Judge Kendall never addressed whether American should have been entitled to compensatory damages based upon the mere fact that the APA engaged in an illegal strike over a minor issue in violation of the RLA. Rather, Judge Kendall responded to the APA's failure to abide by his earlier temporary restraining order enjoining the APA from continuing to engage in the sick-out strike. If the APA had ceased its illegal strike in accordance with Judge Kendall's injunction, the APA most likely would never have been fined. But American still would have suffered the economic impact for five days of the strike because the sick-out began on February 5, 1999, and Judge Kendall's temporary restraining order was not issued until February 10, 1995.[308]

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[305] *See id.* at *2.

[306] *Id.*

[307] *Id.*

[308] *See* Terry Maxon, *Pilots Must Pay $45.5 million*, DALLAS MORNING NEWS, Apr. 16, 1999, at A20.

VI. CONCLUSION

Courts should allow management to recover damage remedies against labor for illegally striking over a minor issue. The justifications for this proposition seem to be quite strong. First, the cooperative manner in which the RLA was adopted gives credence to the argument that the RLA was fashioned to be quasi-contractual in nature. Based upon this principle, a damage remedy is proper since a breach of an RLA obligation is analogous to a breach of contract terms, for which damages have always been an acceptable remedy. This quasi-contractual approach was adopted by both the majority and dissenting opinions in *Marquar*,[309] the *Conrail* opinion,[310] and has been adopted by distinguished commentator Dennis Arouca.[311]

The argument for pro-management damages is strengthened by the position that RLA obligations are mutual obligations and should require a basis for mutual remedies. The Supreme Court has categorically held that the RLA's status quo obligation applies expressly to both management and labor.[312] It seems logical that this holding would also apply to the RLA as a whole, considering the cooperative manner in which management and labor fashioned the enactment of the RLA. Accordingly, because courts have rendered damage awards against management for violating their RLA obligations, in order to maintain a balanced enforcement scheme, the RLA should be enforced similarly against labor.

Second, to maintain the balance of power between management and labor, management needs the ability to recover damages against labor to deter illegal CHAOS and sick-out style negotiating tactics. Without such damage awards, the primary goal of the RLA—to avoid any interruption to the operation of any carrier—is severely frustrated. Mr. Parker's hypothetical and the recent APA sick-out strike provide powerful examples of just how much damage, both in actual losses and lost goodwill, can be sustained by a union strike that is strategically timed to impact management at it most vulnerable moment. Furthermore, this aspect of the pro-management damage award argu-

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309 *See Marquar*, 980 F.2d at 382.

310 *See Consolidated Rail*, 908 F. Supp. at 264.

311 *See* Arouca, *supra* note 198, at 779.

312 *See* Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 143 (1969).

ment has been well received in recent court decisions.[313] Specifically, Judge Batchelder and the *Conrail* court both recognized the insufficiency of injunctive relief as a remedy for a series of short-lived, but well coordinated illegal labor strikes. Therefore, a damage remedy is the only effective remedy available. The principle that when a vested legal right is violated, the law must furnish an adequate remedy is steeped well in the tradition of American jurisprudence dating as far back as *Marbury v. Madison.*[314] Since injunctive relief is an ineffective and meaningless remedy in this situation, a damage remedy must be made available. Besides, to withhold a damage remedy for management in this situation ignores the re-occurring failure of all pre-RLA legislative efforts to provide an effective dispute resolution mechanism. Without a damage remedy, labor can basically sidestep the compulsory arbitration procedures mandated by the RLA, which places the labor industry in the same position it was in prior to the amendment of the RLA in 1934.

Third, the Supreme Court in *Franklin* clearly held that absent clear congressional direction to the contrary, the federal courts have the power to award any appropriate relief, including damage awards.[315] This holding completely repudiates *Brown*, which required the presence of an express provision authorizing the issuance of a damage award.[316] This is very significant because since the *Brown* decision in 1957, courts have relied upon *Brown* through *stare decisis* to disallow damage awards in favor of management.[317] Courts still clinging to the common law justification for withholding monetary damages to management merely begs the questions presented throughout this comment. While *stare decisis* is a powerful doctrine in American jurisprudence, it must be balanced against reason. To hold against management simply because previous courts have done so without justification does not seem reasonable. This is especially so in light of the evolving dynamics within the labor industry and the Supreme Court's holding in *Franklin.*

Finally, allowing damage awards in favor of management does not deprive unions of legitimate negotiating leverage. As Judge

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[313] *See Marquar*, 980 F.2d at 359 (referring to Judge Batchelder's dissent); *Consolidated Rail*, 908 F. Supp. at 264.

[314] 5 U.S. at 137.

[315] *Franklin*, 503 U.S. at 1032.

[316] *Brown*, 252 F.2d at 155.

[317] *See Marquar*, 980 F.2d at 381 (discussing the "Common Law" that has developed throughout the history of the RLA).

Batchelder observed, the union is still left with several "legal" alternatives to engaging in "illegal" behavior.[318] Should labor believe management is using improper negotiating tactics over a minor issue, labor may go to the federal courts to enjoin management from behaving in such a manner. Absent such conduct by management, labor should abide by their no-strike obligations and follow the compulsory dispute resolution mechanisms provided by the RLA.

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[318] *See id.* at 379.


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